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# State v. Fiori Respondent's Brief Dckt. 44861

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LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division

LORI A. FLEMING  
Deputy Attorney General  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44861
Plaintiff-Respondent,	)	
	)	Kootenai County Case No.
v.	)	CR-2016-9689
	)	
BRIAN GREGORY FIORI,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Fiori failed to establish that the district court abused its discretion by imposing and ordering into execution a unified sentence of 12 years, with five years fixed, upon his guilty plea to felony DUI?

Fiori Has Failed To Establish That The District Court Abused Its Sentencing Discretion

The state charged Fiori with felony DUI (one prior felony DUI within 15 years), with a persistent violator enhancement. (R., pp.43-45, 93-95.) A jury found Fiori guilty of DUI, and Fiori admitted the felony and persistent violator enhancements. (R., pp.105, 127.) The district court imposed and executed a unified sentence of 12 years, with five years fixed, and ordered

that the sentence run concurrently with Fiori's sentences for his 2014 felony DUI and 2013 aggravated assault convictions. (R., pp.136-41, PSI, pp.7-8.) Fiori filed a notice of appeal timely from the judgment of conviction. (R., pp.152-54.)

Fiori asserts that the district court abused its discretion by imposing an excessive sentence and ordering the sentence into execution rather than retaining jurisdiction in light of his substance abuse, desire for treatment, mental health issues, and family support. (Appellant's brief, pp.3-5.) Fiori has failed to establish an abuse of discretion.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens,

146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The decision whether to retain jurisdiction is a matter within the sound discretion of the district court and will not be overturned on appeal absent an abuse of that discretion. State v. Lee, 117 Idaho 203, 205-06, 786 P.2d 594, 596-97 (Ct. App. 1990). The primary purpose of a district court retaining jurisdiction is to enable the court to obtain additional information regarding whether the defendant has sufficient rehabilitative potential and is suitable for probation. State v. Jones, 141 Idaho 673, 677, 115 P.3d 764, 768 (Ct. App. 2005). Probation is the ultimate goal of retained jurisdiction. Id. There can be no abuse of discretion if the district court has sufficient evidence before it to conclude that the defendant is not a suitable candidate for probation. Id.

The maximum sentence for felony DUI (one prior felony DUI within 15 years), with a persistent violator enhancement, is life imprisonment. I.C. §§ 18-8005(6), -8005(9), 19-2514. The district court imposed a unified sentence of 12 years, with five years fixed, which falls within the statutory guidelines. (R., pp.136-41.) Fiori’s sentence is not excessive, nor is he a viable candidate for retained jurisdiction or probation, in light of his ongoing decisions to endanger others by driving while intoxicated and his failure to rehabilitate while in the community.

Fiori’s criminal record demonstrates his disregard for the law, the terms of community supervision, and the well-being of others. He has been convicted of eight misdemeanors (including disorderly conduct, disorderly conduct (amended from assault), aggravated menacing, threatening crime with intent to terrorize, disorderly persisting, and three DUIs) and three

felonies (including aggravated assault and two felony DUIs). (PSI, pp.5-9.) His conviction in this case marks his fifth lifetime DUI, and he was on probation for his 2014 felony DUI conviction, as well as a 2013 aggravated assault conviction, when he committed the DUI in this case. (PSI, pp.5-9.)

It is clear that Fiori has a substance abuse problem and needs treatment (see PSI, pp.15-16, 18-20, 23-34), but he has demonstrated through his continued disregard for the law and terms of community supervision that he cannot be successfully treated while in the community (see PSI, pp.15-16, 20). Moreover, although Fiori cites his “mental health issues” as a factor mitigating against the severity of his sentence (see Appellant’s brief, p.4), he represented to the presentence investigator that his mental health was ““Good””; that he had been taking medication for his diagnosed mental health disorders consistently since 2015; and that he did not need mental health counseling as he ““feel[s] the proper faith based groups/friends is sufficient for counsel and medication”” (PSI, p.14). Also, while Fiori has the support of family and friends, that support has clearly not deterred him from getting behind the wheel of a car while intoxicated.

At sentencing, the district court articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Fiori’s sentence, noting specifically that its primary concern was protecting society. (1/9/17 Tr., p.25, L.15 – p.26, L.13.) That the court’s decision to impose and execute the sentence was reasonable is supported not only by Fiori’s criminal history and failure to rehabilitate or be deterred despite prior legal sanctions and treatment opportunities, but also by Fiori’s immediate response to the court’s sentencing decision; rather than accepting responsibility for his own conduct, Fiori blamed his attorney and “[t]his state” for his predicament, exclaiming: “People with 15 felonies don’t even get the

habitual. The same guy, the same situation gets a Rider and I get five. Wow. This state sucks. They should fire [defense counsel]. ... This state sucks.” (1/9/17 Tr., p.27, L.20 – p.28, L.1.) Given Fiori’s outburst, it is clear he is not a suitable candidate for a period of retained jurisdiction or probation.

The state submits that Fiori has failed to establish that his sentence is excessive or that the district court abused its discretion by declining to retain jurisdiction, both for the foregoing reasons and for the reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

#### Conclusion

The state respectfully requests this Court to affirm Fiori’s conviction and sentence.

DATED this 7th day of December, 2017.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

ALICIA HYMAS  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 7th day of December, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JASON C. PINTLER  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

## APPENDIX A



25

1 from my father when I was younger and it -- that's all  
2 over with now. But I've always convinced myself that,  
3 oh, you know, I'll just have a couple beers here or a  
4 couple beers there. And it never works out. Okay.  
5 But I'm not a raging drunk or anything like -- I can do  
6 this. I can definitely do this. I just beg you for  
7 the chance. I mean hang it over my head. I don't  
8 care. You know what I mean? Just -- I'm not gonna  
9 come back. And if I come back, it's gonna be sittin'  
10 back there for someone for the Good Sam or something.  
11 That's my goal at least. So I'll leave it at that.

12 THE COURT: All right.

13 A. But I will do it. I will definitely not come  
14 back.

15 THE COURT: Good. Well, I respect your  
16 determination, Mr. Fiori. Here's what I'm gonna do in  
17 your case. I think a pretty stiff sentence is  
18 important to -- for deterrence of you and of others.  
19 You know if you're a repeat felony DUI offender and  
20 you're a habitual violator of the law -- persistent  
21 violator of the law, there's gotta be a pretty stiff  
22 sentence that respects that and that you and others  
23 like you can get that message.

24 The rest of your sentence -- well, your entire  
25 sentence is up to the Court's discretion. And I've

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1 cases, I'm going to -- on case No. CR 2013-8627, impose  
2 the four year sentence and -- two years fixed plus two  
3 years indeterminate. And in Case No. CR 2014-16616,  
4 I'll impose the five year sentence; two years fixed  
5 plus three years indeterminate. You'll be given credit  
6 on those two sentences of the additional 230 days that  
7 you have served in the local jail time and you will be  
8 remanded to the Department of Corrections on those two  
9 cases as well.

10 Is there anything further from the State?

11 MR. VERHAREN: No, Judge.

12 THE COURT: Anything further from your side,  
13 Mr. Watson?

14 MR. WATSON: No, Judge. Thank you.

15 A. Can I say something about my attorney now for  
16 my appeals? I can't talk about my attorney,  
17 ineffective counsel now?

18 THE COURT: And all these sentences are  
19 concurrent.

20 A. People with 15 felonies don't even get the  
21 habitual. The same guy, the same situation gets a  
22 Rider and I get five. Wow. This state sucks. They  
23 should fire Jay Logsdon. Do we say the appeals here or  
24 what?

25 MR. WATSON: That's later.

26

1 weighed those factors of deterrence, rehabilitation,  
2 punishment, and the one I keep coming back to is the  
3 protection of society. It is not that uncommon in our  
4 world for people to get a DUI. Most of the people that  
5 get a DUI never get another one. And here you got a  
6 felony DUI and then you get another -- more felonies.  
7 Your record is finally caught up to you.

8 I think in order to protect society, I'm going  
9 to impose a sentence. I'm not going to retain  
10 jurisdiction. On your felony DUI charge and habitual  
11 offender charge, I'm going to impose a sentence of 12  
12 years with five years fixed. I will give you credit  
13 for the 230 days that you have served.

14 I will suspend your driving privilege for a  
15 period of five years upon your release from  
16 incarceration. That's when it starts.

17 You will have to reimburse the Department of  
18 Corrections \$100.00 for the Presentence Report and  
19 \$290.50 in court costs.

20 Given the nature of the sentence imposed, I'm  
21 not gonna impose any additional fine. You'll be  
22 remanded to the custody of the Department of  
23 Corrections to serve that sentence.

24 A. Five years?

25 THE COURT: On the two probation violation

28

1 A. This state sucks.

2 THE COURT: You're all done, Mr. Fiori.

3 A. That's for sure.

4 MR. WATSON: Thank you, Judge.

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6 (HEARING CONCLUDED.)

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